

"Sale at retail" means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property to the extent not first subject to a use for which it was purchased, for a valuable consideration. See 86 Ill. Adm. Code 130.201. (This is a PLR).

April 23, 1999

Dear Mr. Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see enclosed), is in response to your letter of February 17, 1999. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of the enclosed copy of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

The following outlines the relevant facts and circumstances regarding the issue of sales tax on the pre-need sale of cemetery merchandise and our requested ruling.

STATEMENT OF FACTS

1. COMPANY is a member of a unitary group of corporations that own and operate cemeteries and funeral homes COMPANY is responsible for, among other things, the filing of Illinois retailer's occupation tax returns for affiliates doing business in Illinois.
2. An affiliate, CEMETERY, an Illinois corporation, operates various cemeteries and funeral homes throughout the State of Illinois. The focus of this discussion will be limited to cemetery business operations, as the issue does not apply to funeral operations.
3. Cemetery is the designated agent of the unitary group. The facts discussed and the ruling requested herein are common to members of the group which own and/or operate cemeteries in Illinois.
4. The ruling requested herein is applicable to periods open under the statute of limitations.
5. Cemetery is not currently under audit by the Department of Revenue.

6. Cemetery is registered as a retailer to collect Illinois retailer's occupation tax ('ROT' or 'Tax') on the retail sale of tangible personal property.
7. Cemetery enters into preneed arrangements with its customers. These arrangements allow customers to pre-select cemetery services and merchandise. Under the terms of the contracts the customer agrees to pay for cemetery merchandise in installments over a period of time to be agreed upon by the parties. (See Exhibit I attached for Retail Installment Contract ('Contract'), an example of Cemetery's preneed merchandise sales contract.
8. The Contract is fully cancelable. If cancelled, the customer is entitled to a partial refund of payments, with the exception of interment rights, and is relieved of all further obligations.
9. Illinois law requires that portions of the payments received be placed in trust. Trusting ensures the future delivery of merchandise and/or services. The trustee distributes no funds to Cemetery until the following documents are provided: (1) certified death certificate; (2) death maturity form; and (3) certificate of performance.
10. Pursuant to the terms of the Contract, Customers can not take possession or title to the merchandise until full payment is made to Cemetery.
11. A Contract may be written to provide services and/or merchandise for more than one customer (e.g., husband/wife, family group, etc.), therefore, delivery can occur over extended time periods.
12. Merchandise sold by Cemetery includes (but is not limited to): vaults, markers, benches, monuments, flowers, caskets, urns, etc.
13. Cemetery does not normally acquire merchandise from vendors until merchandise is to be delivered.

INQUIRY

- I. Based on the foregoing when does a sale occur for Illinois ROT purposes?
- II. If delivery of merchandise will trigger taxability, will delivery of one item trigger taxability of all taxable items on the Contract?
- III. If delivery of merchandise will trigger taxability, will the Tax rate in effect at the Contract's execution apply, or will the Tax rate in effect at the merchandise delivery date apply?
- IV. If ROT is due upon execution of the Contract, is Cemetery precluded by the statute of limitations from a refund when a customer cancels the Contract after statute of limitations expires and no merchandise has been delivered?

OTHER STATES' TREATMENT

Previously we have addressed this issue with the Florida Department of Revenue for a related entity operating exclusively in Florida. The Florida Department of Revenue advised us in Technical Assistance Advisement ##### that sales tax applies upon delivery. California's treatment is much the same and is explained in Reg. §1505(c) Morticians¹ (See Exhibit III for a copy of this regulation).

These examples are provided solely as an indication of how other states have dealt with this issue. We fully understand that neither this Florida ruling, nor the California regulation represents a precedent for Illinois purposes, but will nevertheless serve to assist you in your analysis.

CEMETERY'S CONTENTIONS

Cemetery believes that at inception of the Contract no transaction has occurred that is subject to Illinois ROT because there is no transfer of title or possession of tangible personal property. The Contract is in the nature of an executory type contract, which guarantees future delivery of merchandise and/or services at an unspecified date.

Cemetery contends that Illinois ROT is due upon delivery of each item of taxable merchandise, not before. The sales tax rates in effect at delivery should be applied to the sales price of the merchandise established at the Contract's inception. Cemetery should remit ROT upon delivery of any taxable merchandise.

Any counter determination will represent an undue burden on Cemetery, which would be required to remit ROT on transactions that have not occurred. Additionally ROT would be remitted before payments have been received due to and the installment nature of the Contract as well as existing trusting requirements.

Finally, it appears that Cemetery may be precluded from a refund of Tax paid at Contract's inception if the Contract (including the delivery of merchandise) is cancelled after the expiration of the statute of limitations for the ROT report made transmitting the Tax originally collected.

Based on the foregoing we respectfully request that a determination be rendered to remit ROT to the State upon delivery of merchandise to Cemetery's customers.

* * * * *

To the best of our knowledge the Department of Revenue has not previously ruled on the same or a similar issue for Cemetery or a predecessor. The ruling requested herein

¹ Unlike Illinois, California treats both morticians and cemeteries as retailers for sales tax purposes.

has not previously been submitted to the Department of Revenue and withdrawn prior to the issuance of a ruling.

Cemetery requests that Exhibit I be deleted from the publicly disseminated version of any issued private letter ruling.

Thanks in advance for your consideration. If any of this is unclear, or if additional information is required call me directly at #####.

For your information, we have enclosed a copy of 86 Ill. Adm. Code 130.2130 regarding undertakers and funeral directors. This regulation states, in part, as follows:

"A funeral director is engaged in the business of selling tangible personal property to purchasers for use or consumption when he sells such items of tangible personal property as caskets, grave vaults, grave clothing and flowers to purchasers for use or consumption, and he is required to remit Retailers' Occupation Tax to the Department on his gross receipts from such sales. This is true even though he makes such sales as a part of a funeral."

The Department's regulation, 86 Ill. Adm. Code 130.201, defines the term "Sale at Retail" as follows:

"Sale at retail" means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property to the extent not first subject to a use for which it was purchased, for a valuable consideration, provided that the property purchased is deemed to be purchased for the purpose of resale, despite first being used, to the extent to which it is resold as an ingredient of an intentionally produced product or byproduct of manufacturing. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price shall be deemed to be sales.

As you may note from this regulation, a sale at retail only occurs when there is a transfer of tangible personal property. The facts of your letter state the payments are held in trust and the tangible personal property is not transferred until the terms of the contract are fulfilled. Therefore, a sale at retail does not occur until the delivery of the tangible personal property. The transfer of one item does not trigger the taxability of all items. Just the item delivered is subject to taxation. The tax rate in effect on the date of delivery is the rate that will be applied.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.